THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Consumer Financial Protection Bureau,	)	
Plaintiff,	)	Civil Action No. 3:CV-17-00101
	)	(Hon. Robert D. Mariani)
v.	)	
Navient Corporation, *et al*.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME TO COMPLETE DISCOVERY[1]

Discovery in this case effectively began *over five years ago*, on September 5, 2013, when the CFPB served its first request for information as part of its investigation. To date, nearly fifty depositions have been conducted. Almost *six million* pages of documents have been produced by Defendants. Once millions of Department of Education borrower records are transmitted to the CFPB, more documents and data will have been produced by Navient than by any defendant in any other lawsuit of which we are aware.

Navient's own discovery efforts have been largely focused on finding out what evidence the CFPB has to support the allegations that have been made against

[1] Defendants will be prepared to address the CFPB's motion at the hearing on December 10, as directed in the Court's December 4 Order. Defendants file this response in accordance with Local Rule 7.6.

Navient, which have caused significant reputational and economic damage to the company, its shareholders, and its employees. For example, just last week, a U.S. Senator released a letter claiming that "a previously undisclosed audit" (which was not an "audit" at all and was disclosed in this lawsuit nearly a year ago) conducted by the Department of Education "bolsters allegations that Navient illegally cheated struggling student borrowers out of their rights to lower repayments." Letter from Senator Elizabeth Warren, dated November 13, 2018.[2] Far less reported but exactly on point was the Education Department's public statement regarding the review, which categorically rebutted those allegations: the Department had in fact "concluded that Navient *was not improperly steering borrowers into forbearance*" and that "*[n]othing in the report indicates forbearances were applied inappropriately*." (emphasis added).[3]

If Navient in fact harmed "hundreds of thousands" of borrowers by "steering" them into forbearance, (Compl. ¶ 144), evidence should be readily available. Yet the CFPB has not identified a single borrower whose experience supports this claim. Nor has the CFPB identified a single witness who will testify that the company implemented a policy or practice of "steering" borrowers.

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[2] https://www.warren.senate.gov/newsroom/press-releases/warren-releases-new-evidence-of-navient-student-loan-malfeasance.

[3] The Department of Education's statement is attached as Exhibit 1. *See also* https://news.navient.com/node/11111/pdf.

Lastly, the CFPB's chief investigator, whom it identified as the person with knowledge of supposed harm to borrowers, was not permitted by the CFPB to answer a single question about conversations she had with borrowers. Simply put, it should by now be obvious that evidence of wrongdoing does not lie just under the next rock, waiting to be found—*after five years of searching, every rock has been turned over*.

The CFPB requested and the Court allowed a lengthy period for discovery and has since granted two extensions at the CFPB's request, each time warning that it will be the last. On August 10, the Court extended the discovery deadline by another four months, admonishing that "[g]iven the already substantial length of discovery in this case, the Court advises the parties that it will not be predisposed to grant further discovery extensions." ECF 103, at 9.

Suffice to say, in Navient's view, the CFPB's latest request for yet another extension is filled with unfair characterizations and inaccuracies. Without arguing who is right and who is wrong, what is apparent, however, is that much of the "delay" complained about had already occurred, if at all, before August 10. Therefore, it was known to the parties and the Court and was considered by the Court when it granted the last four-month extension. At this point, Navient believes that the only way to bring this case to a close is for the CFPB's motion to be denied and for any additional fact discovery past the Court-ordered deadline to

be specifically prescribed, identified, and limited in time. To that point, Navient anticipates that the remaining tasks, most of which were created by eleventh-hour deposition notices and witness disclosures by the CFPB (including five witnesses disclosed just yesterday), can be completed within the next month. In addition, Navient recognizes that the experts may need some additional time to review the Department of Education borrower records that will shortly be produced and, for that reason, does not oppose an extension of the expert deadlines by sixty days. The status of the outstanding discovery tasks is set forth below:

1. **Document productions by Navient are complete, and the outstanding documents that the CFPB withheld can be produced in short order**.

The parties agreed that they would make their last productions by October 9. Defendants made their final email production on October 5, which was over two months before the close of discovery. The CFPB's motion identifies no deficiency with Navient's production. And the documents most relevant to the claims were produced long before October 5. Substantially all policies responsive to requests were produced by April, and production of emails related to the policies identified as being at issue were substantially complete by mid-May. The Court directed the parties to negotiate over additional emails that Navient argued were of attenuated relevance, and in late-May, Defendants agreed to review an additional nearly one million emails. In order to meet what was then an August discovery cut-off,

Defendants expended extensive resources to produce those emails, hiring more than 100 contract attorneys to review those documents at a furious pace. Defendants produced many of those documents in July. The final October 5 production was largely redundant with earlier productions, and the documents were produced at a later date to accommodate additional privilege review.

In contrast to Navient's productions, which have been extensive, the CFPB withheld on relevance grounds approximately 98% of the 450,000 documents it self-identified as potentially responsive from search terms of key custodians. As the Court is aware, Navient believes these documents should be produced. Given that the CFPB has already identified and reviewed these documents, burden should not be an issue and the CFPB should easily be able to produce those documents promptly.

2. Privilege logs and the dispute over the CFPB's privilege assertions.

Defendants produced a final detailed privilege log on October 9, the date mutually agreed upon. The CFPB has not raised any issues with the log.

With respect to the CFPB's privilege log, the Court is aware that Defendants have raised issues with the log and believe that a special master should be appointed to resolve those issues. These issues can be addressed during the expert discovery period.

3. The remaining depositions can be completed within the next month.

Nearly two months ago, on October 16, Defendants asked the CFPB whether it intended to notice any more depositions. The CFPB said at the time that it did not have any individuals to add to the list of outstanding noticed depositions (other than one person who was then scheduled before the close of discovery). Then, with the Thanksgiving holiday approaching and weeks remaining in discovery, the CFPB served six additional deposition notices of Navient employees and added several former Navient employees to its disclosures. Thanksgiving travel schedules made it difficult to schedule these depositions before December 7. Nonetheless, the parties had scheduled all but one of these depositions to be completed by December 20. But the CFPB yesterday identified five additional witnesses that Defendants now need to depose. Yet Defendants are committed to scheduling those depositions within the next month.

4. The borrower data can be produced within the next month, and expert deadlines should be extended by sixty (60) days to allow additional time for expert review of this material.

As noted, Defendants are in the process of producing the Education Department's data records for millions of borrowers. The CFPB initially asked—shortly before the May deadline for fact discovery—for "all data" for nearly every federal student loan borrower in Navient's systems, which would encompass more than a *petabyte* (1,000 terabytes) of information. Navient has worked diligently to

negotiate the scope and burden of this production with the interested parties, often brokering the dispute over production of this material that exists between the CFPB and the Education Department. The data is nearly ready for production, but because of the enormous size of the request, it is expected to take about two weeks to transfer the data onto physical hard drives.[4] Once this production is complete, Defendants expect to have produced up to *80 terabytes* of data, as agreed upon with the CFPB. Defendants believe that they can produce the data within the next month. Defendants therefore do not oppose a 60-day extension of the expert discovery deadlines, which will afford sufficient time for review and preparation of any CFPB expert reports.

5. The CFPB's efforts to identify former Navient employees and/or borrowers to add to its witness list is out of time.

According to the CFPB, at some point in the future, they expect to name new witnesses, and they claim that their failure to do so before the discovery cut-off is due to Defendants. But that is not correct.

- **Borrowers**. Defendants produced borrower complaints specifically related to the allegations in the lawsuit over eight months ago, in February and April 2018. Many of these documents were complaints that had already been submitted years ago to the CFPB through its complaint portal. The CFPB has offered no explanation for the three new borrowers identified yesterday, including one identified in support of the claims against Pioneer. Document

[4] One set of data was ready to be transferred in mid-November, but Navient had not received the drives promised by the CFPB. Although Defendants provided an address on November 15, the drives did not arrive at Navient until November 30. Despite that delay, that set is loaded and ready for transfer to the CFPB.

productions for Pioneer were substantially complete in February.

- **Former Employees**. Defendants produced contact information for former employees three months ago, on September 4, 2018. And, the CFPB has had emails from which to identify former employees since mid-May, over seven months ago.

Contrary to its assertions, the CFPB has had ample time to identify its witnesses by the December 7 cut-off set by the Court. And the CFPB acknowledges that if it adds more witnesses, additional depositions will be required, meaning that the CFPB already envisions yet another extension on top of the three months it is now seeking. The CFPB's latest disclosures prove the point by identifying five additional witnesses with only two days remaining in discovery, ensuring that additional depositions need to be scheduled after the current deadline. The Court's deadline should not be extended to allow additional witnesses to be added or discovery may never end.

* * *

Defendants have expended significant resources, including tens of thousands of internal hours and millions of dollars, and have produced unprecedented amounts of documents and data. Discovery boundaries are designed to weigh that burden, and where the CFPB has long been on notice that it must complete discovery by December 7, it is time to end fact discovery. The CFPB must either admit that it has not found evidence to support its claims or permit the case to

move forward to trial. Therefore, Defendants object to an open-ended extension to fact discovery as requested by the CFPB.[5]

Dated: December 6, 2018

Respectfully submitted,

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[5] The remaining tasks can be completed within the next month, and Defendants have no objection to a sixty-day extension of expert deadlines.

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2018, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record who are deemed to have consented to electronic service:

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EXHIBIT 1

First, there was no audit. There was an internal review. ***FSA's May 18, 2017 report did not conclude that Navient was improperly steering borrowers into forbearance.*** That report instead documented that FSA reviewed well over 2,000 borrower calls and that, in approximately 9% of those calls, ***it was not clear*** whether Navient had sufficiently discussed options with the borrower. In response to FSA's preliminary conclusions, Navient provided detailed information about each of the calls at issue. Based on FSA's review of Navient's responses and FSA's independent review of Navient's overall performance, FSA has concluded that Navient is substantially in compliance with its obligations.

FSA Review of Navient

Overview: In January 2017, the Consumer Financial Protection Bureau (CFPB) filed suit against Navient, alleging that the company systematically failed to provide student loan borrowers with adequate services. In the wake of this suit, FSA senior management requested an internal review of Navient's activities under their Federal student loan servicing contract to assess the company's compliance with contractual requirements. ***This review was in addition to ongoing oversight and monitoring activities, which had not indicated widespread issues with non-compliance***, and was intended to provide FSA senior leadership with additional information given the increased focus on Navient created by the lawsuit. ***As discussed in greater detail below, the review was not an audit, did not identify instances of systematic non-compliance, and did not result in findings, sanctions, or the establishment of a corrective action plan.***

Based on our own due diligence, our review of case-specific information provided by Navient, and our analysis of Navient as compared to other servicers, ED concluded that Navient was not improperly steering borrowers into forbearance, a conclusion supported by FSA's May 2017 site visit report. Nothing in the report indicates forbearances were applied inappropriately – the observations noted focused on suggested improvements regarding how to best counsel borrowers on a small minority of calls. In addition, a subsequent review of the borrower-level data provided by Navient in response to the site visit report confirmed that in most cases forbearances were used as intended to resolve short-term issues related to delinquency consistent with the borrower's circumstances.

FSA is committed to ensuring our contractors provide high-quality service for borrowers. Our loan servicing contract requirements, compensation model, and performance-based allocation of additional borrower accounts are all designed to lead servicers to identify the best outcome based on each borrower's individual circumstances. For example, servicers receive $2.85 per month for borrowers who are current on their loans but only $1.05 per month for a borrower in forbearance. We believe this alone provides a significant incentive for servicers to counsel borrowers appropriately regarding the use of forbearance. In addition, our oversight and monitoring activities focus on reviewing servicer activities to ensure borrowers receive courteous, correct, and consistent guidance regarding repayment plans and other loan benefits available to help them manage their debt.

Review: As part of the review, FSA conducted a site visit at Navient from March 20-24, 2017. During this visit, FSA staff reviewed Navient's inbound and outbound call processes, listened to and evaluated recorded inbound calls, and conducted side-by-side reviews of live inbound calls. FSA was also provided with recorded outbound calls that were reviewed after the completion of the site visit. The review did not involve detailed assessments on individual borrower cases beyond issues raised on the specific calls under review.

The review did not result in any findings of non-compliance with contractual requirements. Reviewers did document five observations and related recommendations regarding possible improvements Navient could make to their procedures, processes, and training. FSA staff reviewed 2,388 calls. Because in 220 cases, or 9.4 percent of the calls reviewed, Navient did not offer an option other than forbearance, three of these recommendations involved broadening the scope of interactions where forbearances are under consideration to ensure that borrowers are aware of other options available to most effectively manage their debt.

After being provided with the results of the review, Navient responded with extensive information about each of the cases FSA noted in their observations regarding forbearance application and borrower counseling. Navient argued that this review showed that in most cases the representatives followed established call processes and found the appropriate solution for the borrower's situation. FSA included this response without comment in the final site visit report, which was completed on May 18, 2017.

Other elements of FSA's review included an assessment of data across all Federal servicers to determine whether there were any indications of excessive forbearance use or other non-compliant behavior. ***Program data indicated that Navient's overall use of forbearance was consistent with that of other servicers, while the duration of forbearances for Navient borrowers was actually among the lowest of the Department's nine servicers.*** Navient also had among the highest take-up rates for income-driven repayment plans, as well as longer than average call durations in comparison to all servicers. Servicers pushing borrowers into forbearance without discussing other options would be expected to have shorter than average call durations rather than longer. ***Lastly, a review of the borrower-level data provided by Navient in response to FSA's site visit indicated that in most cases forbearances had been applied appropriately to resolve short-term issues related to delinquency consistent with the borrower's circumstances.***

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[PROPOSED] REVISED CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the deadlines in the August 10, 2018 Order are amended as follows.

1. Fact discovery is extended until January 4, 2019, only for the limited purpose of completion of: (a) production of borrower data; (b) the depositions noticed before December 6, 2018 and of witnesses first disclosed in the CFPB's December 5, 2018 disclosures; and (c) tasks as otherwise ordered by the Court.

2. Reports from Plaintiff's retained experts are due by March 8, 2019.

3. Reports from Defendant's retained experts are due by April 8, 2019.

4. Supplementations are due by May 6, 2019.

5. Expert discovery must be completed by June 7, 2019.

6. All potentially dispositive motions must be filed by July 8, 2019.

Dated: _____, 2018

The Honorable Robert D. Mariani
United States District Judge